UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PHILIP R. BERNSTEIN, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER CH-0432-98-0214-I-1 DATE: MAY 24 1999

Philip R. Bernstein, Chicago, Illinois, pro se.

Thomas H. Gourlay, Jr., Esquire, Cincinnati, Ohio, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Vice Chair Slavet issues a concurring opinion.

OPINION AND ORDER

¶1 This case is before the Board on the agency's timely petition for review of the initial decision, dated March 31, 1998, that reversed the appellant's demotion. For the reasons set forth below, we GRANT the agency's petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the case to the regional office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 Effective December 7, 1997, the appellant was reduced in grade and pay from the position of Supervisory Economist, GS-110-14, to the position of Project Engineer, GS-801-13, with the U.S. Army Corps of Engineers in Chicago, Illinois, pursuant to 5

U.S.C. § 4303. Initial Appeal File (IAF), Tab 4, Subtab D. On appeal of that action, the appellant contested the merits of the performance action and raised the affirmative defense of religious discrimination. IAF, Tabs 1, 12. He further claimed that the agency committed harmful error because, among other things, written statements, affidavits, and deposition transcripts of employees taken during the agency's investigation of his performance were obtained by the agency representative's use of intimidation and coercion. *Id.*

¶3 While the appeal was pending, the appellant moved for summary judgment based on the alleged prejudicial communications of the agency's original representative, Charles Laycock,[1] on February 4, 1998, with prospective witnesses concerning their testimony in the upcoming Board hearing of this matter. IAF, Tab 14. This "February 4, 1998 communication" to each of seventeen anticipated witnesses currently employed by the agency, including the direct witnesses proposed by the agency, included a ninety-page packet of material consisting of the agency's investigative report, the appellant's performance improvement plan, the agency's notice of proposed demotion, the agency's letter of decision, and a twenty-page cover letter, in which Laycock outlined the agency's view of the facts of the case and the issues to be addressed and argued based on the prospective witnesses' anticipated testimony. *Id.*, Attachment C. The administrative judge (AJ) treated the appellant's motion as a request for sanctions under 5 C.F.R. § 1201.43. IAF, Tab 19.

¶4 Based on the appellant's motion, as supplemented, the agency's response to that motion, the appellant's reply to the agency's response, and the record evidence, the AJ, without holding a hearing, granted the appellant's motion and took adverse inferences against the agency as a sanction for Laycock's coercive and intimidating communication with the witnesses. Initial Decision (ID) at 4-10. Based on these adverse inferences, the AJ found that the agency failed to establish by substantial evidence that the appellant's performance was unacceptable, and that the appellant established by a preponderance of

---

[1] Laycock subsequently withdrew as the agency representative in this case. IAF, Tab 17.

evidence his affirmative defense of religious discrimination. ID at 10-11. He therefore reversed the appellant's demotion and ordered interim relief. ID at 11-12.

¶5 The agency has filed a petition for review (PFR), *see* PFR File, Tab 1, to which the appellant has timely responded in opposition, *see id.*, Tab 3. After the close of the record, the agency submitted a reply to the appellant's response, *see id.*, Tab 4, to which the appellant then replied in opposition, *see id.*, Tab 5. We have not considered these latter documents because they were untimely filed and the parties have not shown that they were not readily available before the record closed on review. *See* 5 C.F.R. § 1201.114(i).

ANALYSIS

Interim relief

¶6 The appellant requests that the Board dismiss the agency's PFR because he was not returned to status quo ante when he was detailed from his GS-14 Supervisory Economist position in the Planning Division to an unspecified set of duties at the GS-14 grade level in the Programs and Project Management Division effective the date of the initial decision. PFR File, Tab 3. When an agency complies with an AJ's interim relief order not by returning the appellant to his former position and duty station, but by returning him to duty in some alternative position or duty station, an agency must make a determination that the appellant's return to or presence in the workplace would be unduly disruptive. 5 U.S.C. § 7701(b)(2)(A); *Robinson v. Department of Veterans Affairs*, 67 M.S.P.R. 334, 337 (1995). In accordance with the Board's regulations, the agency's PFR was accompanied by evidence that the agency complied with the interim relief order by making a determination that the appellant's return to his regular assignment would be unduly disruptive and communicating that determination to the appellant in writing. 5 C.F.R. § 1201.115(b); PFR File, Tab 1, Exhibit 3. Since the Board's authority is restricted to deciding whether an undue disruption determination was made when required, and whether the appellant is receiving appropriate pay and benefits, we cannot review whether the agency's reasons for assigning the appellant to the Programs and Project Management Division were, as he claims, improper. *See Patterson v.*

Department of the Air Force, 77 M.S.P.R. 557, 561, *aff'd*, No. 98-3199 (Fed. Cir. Sept. 9, 1998) (Table). Accordingly, we find that the agency has complied with the interim relief order.

The merits of the agency's PFR

¶7 An AJ may impose sanctions upon a party, including drawing an inference in favor of the requesting party, as necessary to serve the ends of justice. 5 C.F.R. § 1201.43; *see, e.g.*, *Montgomery v. Department of the Army*, MSPB Docket No. SF-0752-97-0767-I-3, slip op. ¶ 17 (Dec. 17, 1998) (adverse inference drawn in favor of the appellant with regard to materials sought for the agency's failure to comply with the AJ's orders to submit such materials); *Taylor v. U.S. Postal Service*, 75 M.S.P.R. 322, 326-27 (1997) (where the agency failed to show good cause for not making an employee witness available for a hearing, the Board drew an adverse inference that the witness would have supported the appellant's version of events); *Askew v. Department of Transportation*, 15 M.S.P.R. 703, 707-08 (1983) (where the agency presented a prima facie case in support of its charge, the AJ was permitted to draw an adverse inference from the appellant's decision not to testify in rebuttal). Absent a showing of abuse of discretion, an AJ's determinations regarding sanctions will not be reversed. *See Montgomery*, slip op. ¶ 17.

¶8 Here, the AJ found that Laycock's February 4, 1998 communication with the seventeen prospective witnesses was coercive on its face, and that any testimony from these witnesses would be irrevocably tainted. ID at 10. He therefore found, without holding a hearing, that "the appellant ha[d] been deprived of his fundamental right to a fair hearing regarding all of the issues raised by his appeal, including the agency's case-in-chief and his religious discrimination affirmative defense." *Id.* Based on these findings, the AJ imposed the following adverse inferences against the agency:

> 1) To take an adverse inference finding against the credibility of all of the witnesses to be called in support of the agency's case in chief to prove the appellant's performance was unacceptable.
>
> 2) To take an adverse inference against the agency that all written statements, affidavits, and deposition transcripts taken during the agency's

> investigations of the appellant's performance were tainted by the agency's intimidation or coercion of all of the witnesses during interviews, affidavit preparation, and depositions.
>
> 3) To take an inference in favor of the appellant that the credible and untainted testimony of all of the proposed witnesses would establish, by preponderant evidence, a prima facie case that the agency's demotion action constituted religious discrimination against the appellant due to his Jewish faith.
>
> [4]) To take an inference in favor of the appellant that the credible, untainted, testimony of the subject witnesses would establish, by preponderant evidence, that any articulated legitimate business reason for the demotion action was a pretext for religious discrimination.

Id. Based on these adverse inferences, the AJ then found that the agency had not satisfied its burden of proof with regard to the performance action, and that the appellant had proven his religious discrimination claim. ID at 10-11.

¶9 The agency argues that the first, third, and fourth adverse inferences, resulting, in effect, in the dismissal of its "case" with prejudice and the denial of an opportunity to respond to the appellant's religious discrimination affirmative defense, are excessive sanctions for Laycock's February 4, 1998 communication. PFR File, Tab 1 at 6-15, 21-26. Without deciding whether similar sanctions would ever be warranted prior to a Board hearing for a party's coercion or intimidation of prospective witnesses, we agree with the agency that the AJ abused his discretion in imposing such sanctions here.

¶10 The Board had declined to impose sanctions where an appellant alleged that an agency official's contact with him following the issuance of the initial decision was coercive, absent a specific allegation that the agency official attempted to dissuade him from filing a petition for review or intimated adverse consequence if he did so. *West v. U.S. Postal Service*, 44 M.S.P.R. 551, 560-61 (1990). In that case, the appellant averred in an affidavit that an agency official contacted him at home following the issuance of the initial decision, discussed "end-of-service termination options," and stated that the appellant should reconsider his position concerning whether or not he intended to file a petition for review. *Id.* He requested that sanctions be imposed on the agency for contacting him even though it knew that he had a representative. *Id.* at 560. The Board

declined to impose sanctions on the agency, finding that the appellant's assertions did not rise to the level of establishing intimidation on the part of the agency official. *Id.* at 560-61.

¶11 The Board, however, has also found that evidence showing that an agency representative had implied that an employee's sick leave record would be investigated should he testify unfavorably raised the specter of intimidation of witnesses. *Bowers v. U.S. Postal Service*, 3 M.S.P.R. 562, 564-65 (1980). In that case, the appellant's representative, on the day after the Board hearing, learned of an alleged abortive attempt by the agency representative to secure an additional witness and the agency representative's alleged use of intimidation to get that witness to testify in favor of the agency. *Id.* at 563. The appellant's representative submitted an affidavit in which the coveted witness asserted that, after questioning him about the agency's case, the agency representative then questioned him about his attendance, stating that he would personally ask the witness' supervisor to look into his sick leave, and threatened to send him to an agency physician to determine if he was fit to work for the agency. *Id.* at 563-64. Although that witness did not testify at the hearing, the appellant's representative alleged that the credibility of all of the agency's witnesses was impaired. *Id.* at 564-65. The Board remanded the case for a determination of whether any witness' testimony had been tainted by such misconduct. *Id.* at 565. On remand, a second hearing was held following which the AJ determined that none of original testimony was the product of coercion. *See Bowers v. U.S. Postal Service*, 11 M.S.P.R. 395, 396-97 (1982).

¶12 In cases where an agency has imposed an adverse action based on the charge of witness intimidation, the Board has not sustained that charge in the absence of evidence showing that the appellant suggested that an employee either not testify or not testify truthfully or that the appellant directed any personal threats to an employee or intimated that adverse consequences would befall a particular employee should testimony be unfavorable. *See Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 238-39 (1993); *Garst v. Department of the Army*,

56 M.S.P.R. 371, 379-81 (1993), *recons. granted on other grounds*, 60 M.S.P.R. 514 (1994).

¶13 In sum, the Board has required evidence showing that an agency official threatened an employee witness with adverse consequences, such as disciplinary action, or suggested that an employee witness either not testify or not testify truthfully before it will find that the agency official intimidated that employee witness. *See Alsedek*, 58 M.S.P.R. at 238-39; *Garst*, 56 M.S.P.R. at 379-81; *West*, 44 M.S.P.R. at 560-61; *Bowers*, 3 M.S.P.R. at 564-65.

¶14 Here, the AJ found that the following paragraph in particular from Laycock's cover letter in the February 4, 1998 communication was intimidating per se:

> 11. It is your job to cooperate with me (the agency's designated counsel) in the preparation of your testimony and to provide truthful and complete answers to my questions, and the questions of (the appellant) and the judge. **This adverse action and the hearing of this appeal will be a success if every witness provides truthful and complete testimony, regardless of the decision issued by the MSPB**.

ID at 5, 8-9; IAF, Tab 14, Attachment C at 4. The AJ found that paragraph 11 conveyed "to virtually all of the parties' proposed witnesses" that the agency may "violate the law and ignore a Board final decision adverse to the agency's view of the propriety of its action." ID at 8-9.

¶15 The AJ further found that the remaining paragraphs in the cover letter, which set forth the agency's detailed arguments and factual assertions concerning the merits of the performance action and the appellant's affirmative defenses of harmful error and religious discrimination, communicated to the prospective witnesses the version of events that Laycock and the agency "regard[ed] as 'the truth,' and by inference, that the subject witnesses' testimony w[ould] be 'used' by the agency to prove this 'truth.'" ID at 6. Those remaining paragraphs read together with paragraph 11, the AJ found, communicated to the prospective witnesses that they were required to testify in concert with Laycock's and the agency's stated views and that, if they did so, the agency would prevail either because the Board would rule in its favor or, if the Board should issue a decision reversing the appellant's demotion, because the agency would ignore the Board's

decision and refuse to cancel the demotion in violation of law. ID at 5-10. The threat of the latter situation, the AJ found, particularly intimidated the witnesses because it implied that the agency would not feel bound by a Board decision in any subsequent adverse action appeal brought by a witness should he or she be disciplined in retaliation for giving testimony unfavorable to the agency in this case. ID at 8.

¶16 We agree with the agency that the AJ has read too much into the February 4, 1998 cover letter. A far more likely interpretation of paragraph 11 and the remaining paragraphs of Laycock's February 4, 1998 cover letter, either read together or separately, is that the agency wants the witnesses to testify truthfully and completely, i.e., honestly and openly, and that, if they do so, the agency will consider the appeal a success no matter what the outcome. PFR File, Tab 1 at 6-9. These paragraphs, combined with the remainder of the documents included in the February 4, 1998 communication, fail to show that an agency official suggested that a prospective witness either not testify or not testify truthfully or directed any personal threats to a witness or intimated that adverse consequences would befall a particular witness should testimony be unfavorable. *Cf. Alsedek*, 58 M.S.P.R. at 238-39; *Garst*, 56 M.S.P.R. at 379-81; *West*, 44 M.S.P.R. at 560-61; *Bowers*, 3 M.S.P.R. at 564-65. Thus, the AJ erred in finding that the February 4, 1998 communication per se intimidated the prospective witnesses and tainted their testimony irrevocably. *Id.*

¶17 We further find that, contrary to the AJ, *see* ID at 9-10, a different result is not required by the fact that sixteen of the seventeen prospective witnesses were under the deciding official's supervision in their employment.[2] Accordingly, we find that the AJ erred in finding, based solely on the record below, that the February 4, 1998 communication intimidated the prospective witnesses and irrevocably tainted their testimony and, consequently, he abused his discretion in imposing sanctions based on that finding. *Cf. Alsedek*, 58 M.S.P.R. at 238-39; *Garst*, 56 M.S.P.R. at 379-81; *West*, 44 M.S.P.R. at 560-61; *Bowers*, 3 M.S.P.R. at 564-65; *cf. also Shepherd v. American*

---

[2] The deciding official was one of the seventeen prospective witnesses who received the February 4, 1998 communication. IAF, Tab 14, Attachment C.

Broadcasting Companies, Inc., 62 F.3d 1469, 1483-84 (D.C. Cir. 1995) (finding that no harassment of a potential witness occurred and, thus, that sanctions were not warranted where the defendant's attorney merely contacted a potential witness a year after the witness had informed the defendant that she would not cooperate and then, when the witness again refused to cooperate, the attorney pursued the matter no further); *Republic of Philippines v. Westinghouse Electric Corp.*, 43 F.3d 65, 69-72, 80-81 (3d Cir. 1994) (sanctions warranted where the plaintiff threatened two witnesses with criminal prosecution and one witness with disciplinary action as a result of their testimony in favor of the defendant); *Frumkin v. Mayo Clinic*, 965 F.2d 620, 626-27 (8th Cir. 1992) (district court likely would not have abused its discretion if it had dismissed the case as a sanction where the plaintiff threatened to kill the defendant's witnesses while the case was pending); *but cf. Harlan v. Lewis*, 982 F.2d 1255, 1257-62 (8th Cir.) ($5,000 sanction against the defendant's attorney was warranted where, during the discovery process, he suggested to one potential witness that he not testify for the plaintiff and to another that he not speak to the plaintiff's counsel), *cert. denied*, 510 U.S. 828 (1993). Accordingly, we remand this case for further adjudication, including a hearing, on the merits of the performance action and the appellant's affirmative defenses.

¶18 On remand, the AJ should evaluate each witness' credibility, considering, among other factors, whether the witness' testimony has been irrevocably tainted by an agency official's conduct, e.g., by the February 4, 1998 communication. *See Bowers*, 3 M.S.P.R. at 565; *see also Hillen v. Department of the Army*, 35 M.S.P.R. 453, 460 (1987) (an AJ "must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness, so that in the light of his or her experience, he or she can determine whether a mutation in the testimony could reasonably be expected as a probable human reaction") (citations omitted); *cf. Perna v. Electronic Data Systems, Corp.*, 916 F. Supp. 388, 403 (D.N.J. 1995) (the appropriate sanction for the plaintiff's act of viewing and photocopying the defendant's documents without permission during the discovery period is a jury instruction making the jury aware of the plaintiff's improper conduct for their consideration on issues of credibility arising in the case). While it is

true that several of the prospective witnesses submitted sworn and unsworn statements describing their reactions upon reading the February 4, 1998 communication, *see* IAF, Tab 13, Tab 14, Attachments A, B, and Tab 20, Enclosures 7, 11, the AJ will be in a better position to evaluate the effect of Laycock's February 4, 1998 communication on those witnesses' testimony after holding a hearing in which he can observe the witnesses' demeanor and question them about their reactions, *see Hillen*, 35 M.S.P.R. at 458-60. The AJ should give the appellant broad discretion to cross-examine the agency's witnesses on this issue. Further, the AJ should admonish all witnesses of their duty to testify truthfully and fully.

¶19 If the AJ finds on remand that any of the witnesses' testimony has been irrevocably tainted by conduct of an agency official, the AJ should then consider whether a sanction, such as making an adverse inference that the affected witness' testimony would have been favorable to the appellant, is necessary to serve the ends of justice. *See* 5 C.F.R. § 1201.43.

¶20 As set forth above, the AJ also made an adverse inference, i.e., the second adverse inference, that interview statements, affidavits, and depositions obtained by Laycock from agency employees during the investigation of the appellant's performance were favorable to the appellant because he found that they were coerced. ID at 10. As the agency correctly asserts, however, *see* PFR File, Tab 1 at 15-21, the AJ did not explain the basis for this finding other than merely referring to the sworn and unsworn statements by several agency employees complaining of coercion they believed they experienced during interviews, affidavit preparation, or depositions conducted by agency counsel, s*ee* ID at 8-10. The agency contests on review, as it did below, the contents of those employees' statements and argues that the second adverse inference effectively rejected any testimony by the proposing and deciding official, two prospective witnesses named by the agency who would purportedly testify in part to the absence of coercion and intimidation during the interviews, affidavit preparation, and depositions. PFR File, Tab 1 at 18; *see*, *e.g.*, IAF, Tab 6, Agency Response and Declaration of Charles Laycock, and Tab 15. We agree with the agency and also note that, by making this finding without hearing relevant testimony or providing further explanation and by

drawing this adverse inference, the AJ summarily rejected the agency's account of Laycock's conduct without even addressing Laycock's declaration. *See* IAF, Tab 6, Declaration of Charles Laycock.

¶21 Moreover, an AJ's sanctioning authority is limited to misconduct occurring during the appeal. *See* 5 C.F.R. § 1201.43; *cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44, 57-58 (1991) (sanctions can be imposed for conduct before the court in the very proceeding in which sanctions are sought or for abuses of processes occurring beyond the courtroom, such as disobeying the court's orders); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987) (court's power to punish for contempt reaches conduct before the court and that beyond the court's confines, because the underlying concern that gave rise to this power was disobedience to the orders of the court, regardless of whether such disobedience interfered with the conduct of the trial, as well as the disruption of court proceedings). Here, the sanctioned conduct, i.e., Laycock's alleged coercion of the prospective witnesses during interviews, affidavit preparation, and depositions, occurred during the investigation of the appellant's performance before the agency decided to demote the appellant. *See, e.g.*, IAF, Tab 14, Attachments A, B, and Tab 20. Thus, this alleged coercion was beyond the AJ's sanctioning authority. *See* 5 C.F.R. § 1201.43; *Chambers*, 501 U.S. at 43-44, 57-58; *Young*, 481 U.S. at 798. Instead, the AJ should have addressed, as the appellant argued below, whether this alleged misconduct harmed the appellant's substantive rights. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991) (harmful error under 5 U.S.C. § 7701(c)(2)(A) cannot be presumed; an agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error).

¶22 Accordingly, we find that the AJ improperly found that coercion occurred during the interviews, affidavit preparation, and depositions, and that his imposition of the second adverse inference sanction based on this finding was likewise improper. Following the hearing on remand, therefore, the AJ shall summarize the evidence, resolve issues of credibility, and make further factual findings on the issue of whether Laycock or any

other agency official coerced interview statements, affidavits, and depositions from employees during the investigation of the appellant's performance and whether such coercion harmed the appellant's substantive rights. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980); *see also Stephen*, 47 M.S.P.R. at 681, 685; *Bowers*, 3 M.S.P.R. at 565.

¶23 Finally, the agency argues that the AJ improperly considered an ex parte communication, i.e., a February 9, 1998 letter to the AJ from Alvin Gordon, an agency employee who was named as a witness by the appellant, which was not served on the agency. PFR File, Tab 1 at 26-30. We need not address this argument, however, because the agency concedes that it now has a copy of that letter in its possession, *see id.* at 26, to which it can respond on remand.

ORDER

¶24 Accordingly, we REMAND this case for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF VICE CHAIR BETH S. SLAVET

in

Philip R. Bernstein v. Department of the Army,

Docket No. CH-0432-98-0214-I-1

I agree with the majority's determination that Laycock's communication was not intimidating *per se,* and that the administrative judge (AJ) therefore abused his discretion in imposing sanctions on the agency. I write separately to emphasize three points that do not come through as clearly as they might in the majority opinion.

First, the majority opinion does not give a full picture of the background leading up to Laycock's communication with the witnesses. According to Laycock's sworn statement and supporting evidence, when the appellant learned that agency investigators were interviewing employees and gathering evidence in contemplation of a performance-based action against him, he told his subordinates in several e-mail messages to be very careful in answering the investigators' questions, and requested that they inform him of every question that they were asked; his messages implied to his subordinates that the investigators were using unfair tactics. Laycock avers that several employees told him that they were intimidated by the appellant's e-mails, and that they "feared reprisal for cooperating with the investigation." *See* IAF, Tab 6, Laycock dec. at 36 & Att. 5, 6, 8. Against this backdrop, Laycock's communication may have been a legitimate attempt to assert control over the development of the evidence and to counter this alleged witness intimidation by the appellant. Without a hearing, the AJ was not in a position to say whether Laycock, the appellant, both, or neither, acted improperly. In addition, given the conflicting evidence from the parties, without a hearing, the AJ was not in a position to say which, if any, of the witnesses would have been unable to provide truthful testimony.

Second, and in a related vein, I do not believe (nor do I read the majority opinion to hold) that the sanctioning authority of AJs is limited or will always be subject to second-guessing on petition for review. Rather, the reason the AJs imposition of a sanction is being vacated in this case is that the sanction was outcome-determinative, and was imposed without hearing evidence to resolve the conflicting views of the parties, as detailed above. I would hold (and I believe that the majority opinion can be interpreted to hold) that where, as here, a party's representative is accused of misconduct by the opposing party, and where the accused representative submits evidence and

argument that, if true, could amount to a successful rebuttal to the accusation of misconduct, the AJ should not impose an outcome-determinative sanction without first holding a hearing to resolve the factual dispute. This holding is analogous to the rule that an AJ may not resolve disputed factual issues going to jurisdiction against the appellant solely on the pleadings. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

Third, I would not limit (nor do I read the majority opinion to limit) the AJ's discretion on remand to hold either a mini-hearing devoted solely to the question of whether Laycock's communication warrants a sanction, or a full-dress hearing on the merits that includes an individualized assessment of each witness's credibility in light of the appellant's assertion of misconduct by Laycock. I believe that implicit in the majority opinion is a grant of discretion to the AJ not to hold a full hearing on the merits if, after reading the Board's remand decision and conferring with the parties, the AJ determines the most efficient course to be to hold a mini-hearing on alleged misconduct only. In an analogous situation, an AJ has the discretion to hear evidence on compensatory or consequential damages either at the merits phase of a case or in an addendum proceeding, depending on the AJ's assessment of the best way to proceed under the facts of a given case. 5 C.F.R. § 1201.204(c). I do not read the majority opinion as foreclosing a similar choice in this case, that is, a full hearing on the merits or a hearing devoted only to sanctions, since the AJ will be in a better position on remand than the Board is in now to determine how best to proceed.

With these additional considerations in mind, I concur in the majority's decision to vacate the initial decision and remand the appeal to the regional office for further proceedings.

MAY 24 1999
Date

Beth S. Slavet
Vice Chair